IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Stephen E. Eberhardt,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
David G. Seaman, Patrick E. Rea, Kevin Suggs,	)	
Mark R. Moylan, Jeffrey G. Ficaro,	)	No. 17 L 11231
Citizens to Elect Mayor Dave Seaman, Tinley First,	)	
Thomas "Tom" Blaney, Maria Cupp, Albert "Al" Brooks,	)	
Timothy Janecyk, Bridgette Rapisarda, and	)	
Michael Stuckly,	)	
	)	
Defendants,	)	

MEMORANDUM OPINION AND ORDER

Rhetorical hyperbole is a common form of political discourse protected from defamation claims by the First Amendment to the United States Constitution. Additionally, the federal Communications Decency Act immunizes those who republish on electronic media defamatory statements made by others. Each of the defendants' statements about the plaintiff or his conduct were either true or substantially true and were rhetorical hyperbole both originally and in republished form. The defendants' motions to dismiss are, therefore, granted, the plaintiff's complaint is dismissed in its entirety with prejudice, and all other motions are either stricken or denied.

FACTS

Stephen Eberhardt is a self-employed attorney living in Tinley Park, Illinois. In 2010, Eberhardt created the Facebook page, "Tinley Sparks," which is "dedicated to educating residents, business owners and visitors about the workings of local government in an effort to improve the health, safety and general welfare of everyone living in, working in or visiting Tinley Park, IL." Tinley Sparks investigates and reports on issues related to Tinley Park government provided by tipsters, including village employees.[1]

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[1] Eberhardt created the Facebook page around the time that he and others sued Tinley Park and various village officials for up zoning various residential parcels. *See Bayless v. Village of Tinley Pk.*, 10 CH 25022 (Cir. Ct. Cook Cty.), *on removal* 10 CV 5826 (N.D. Ill.).

Eberhardt and an associate, Karen Weigand, remained active in Tinley Sparks and village politics in the run up to the village's 2013 consolidated election. Then, in February 2014, the two filed a 76-page federal-court complaint against the village and 32 persons, including David Seaman, a village trustee, and Patrick Rea, the village clerk (who are also defendants in this case). *See TinleySparks, Inc. v. Village of Tinley Pk.*, 14 CV 853 (N.D. Ill.). That complaint alleged that the defendants had violated Eberhardt's and Weigand's first and fourteenth amendment rights to the United States Constitution by preventing them as candidates for public office from fairly participating in the 2013 election. The complaint also alleged that Seaman and Rea had attacked Eberhardt and Weigand's personal, political, and business interests both before and after the 2013 election.[2]

On June 1, 2015, during the pendency of the federal lawsuit, Tinley Park's mayor, Edward Zabrocki, Jr., retired after 34 years in office. *See* "Zabrocki Resigns as Tinley Park Mayor," www.chicagotribune.com/.../ct-sta-zabrocki-resigns-st-0507-20150506-story.html. On the same day, the village trustees voted 3-2 to appoint David Seaman as Acting Village President/ Mayor. *See* "Tinley Park Narrowly Names Dave Seaman as Mayor," www.chicagotribune.com/suburbs/.../ct-sta-tinley-mayor-st-0603-20150602-story.html. Seaman had been a trustee since 1984 and affiliated with Zabrocki's political organization.

In September 2016, Seaman announced that he planned to run for his seat in the April 2017 village election. *See* "Tinley Mayor Announces Slate," www.chicagotribune.com/.../ct-sta-tinley-mayor-slate-st-0919-20160919-story.html. At the same time, four other persons announced their intentions to run for various village positions in the election. *See id.* First, Patrick Rea announced that he would run for re-election as village clerk. Rea had served as a village trustee even before Zabrocki's election in 1981. In 2009, village trustees appointed Rea as village clerk, and he was elected to that office in 2011. Rea was also associated with Zabrocki's political organization. Second, Kevin Suggs, an appointed village trustee, announced that he intended to run for the seat he held temporarily. Third and fourth, Mark Moylan and Jeffrey Ficaro both announced their intentions to run for positions on the village board of trustees. Together, Seaman, Rea, Suggs, Moylan, and Ficaro ran as a political party identified on the April 2017 ballot as "Tinley First."

Thomas Blaney, Maria Cupp, Albert Brooks, and Michael Stuckly are village residents and are friends of the Tinley First candidates or supporters of their slate. Timothy Janecyk, another friend and supporter of Tinley First, created and served as the administrator of a Facebook page known as "Tinley

[2] On March 15, 2017, Judge Elaine Bucklo entered a stipulated order of dismissal in that lawsuit.

Park Community Group" that supported the Tinley First slate. Shortly before the election, Janecyk created two additional Facebook pages – "Citizens Against Mike Glotz for Trustee" and "All Attacks All the Time" – both of which he used to support the Tinley First slate and to attack and electronically post allegedly defamatory content against Eberhardt and others. Bridgette Rapisarda, also a supporter of the Tinley First slate, created and served as the administrator of a Facebook page known as "All Things Tinley First." She also posted political signage outside her home in support of the Tinley First slate.

In November 2016, Tinley Sparks received an anonymous tip that the Illinois Department of Insurance had previously suspended Moylan's license to sell insurance because of dishonest business practices. Eberhardt submitted a Freedom of Information Act request to the department for documents related to Moylan's license suspension. One of the documents Eberhardt received was the department's February 3, 2003 stipulation and consent order. In it, Moylan did not admit to violating the Insurance Code, but consented to surrendering his license to sell certain insurance lines for three years and to pay a $1,000 fine.

On January 27, 2017, Eberhardt spoke with Moylan at his office regarding the information Eberhardt had received in response to the FOIA request. Between February 3 and 7, 2017, Moylan allegedly contacted his client base using State Farm Insurance Company's proprietary information to make false and defamatory accusations against Eberhardt with the purpose of harming Eberhardt and his business. In essence, these statements accused Eberhardt of trying to force Moylan out of his race for trustee. At a February 7, 2017 village trustee meeting, and in an allegedly coordinated effort, Blaney, Cupp, and Moylan asked trustee Jacob Vandenberg whether he was behind Eberhardt's confrontation with Moylan at his office. *See* https://www. youtube.com/watch?v=8QkIiB8TSFk&t=4022s. The three either insinuated or directly stated that Vandenberg had sent Eberhardt to Moylan's office to extort his withdrawal from the election lest the fact of his licensure suspension be made public. The next day, the Tinley First Facebook ran a post stating, "Jake Vandenberg AND his accomplice exposed." The accomplice was Eberhardt.

On March 15, 2017, Moylan submitted a "request for investigation" to the Attorney Registration and Disciplinary Commission (ARDC) complaining of Eberhardt's conduct. Moylan stated that Eberhardt had, "tried to blackmail and bully me out of the Trustee race. . . ." Attorney Burton Odelson allegedly assisted Moylan and others in preparing the request for investigation and made no reasonable inquiry as to the truth of the allegations in the request for investigation. Odelson allegedly knew that the

request for investigation would be used for political purposes and should have known that information in the request was not subject to public disclosure absent the ARDC filing a formal complaint.

Regardless of what Odelson or anyone else knew or should have known, on March 18, 2017, the Tinley First web site contained a post stating: "Vandenberg bullied Mark Moylan." An included press release stated that Moylan, "has lodged a complaint against a one-time candidate for Mayor." The post published Moylan's entire request for investigation and improperly labeled it as an ARDC complaint. In the press release, Moylan admitted to the infraction and fine, stated that he regretted his actions, but omitted any reference to the suspended license. Eberhardt alleges that the less-than-complete disclosure made obvious the intentional political motivations of those who allegedly defamed him. Also on March 18, 2017, Tinley First posted an entry on its Facebook page referencing the ARDC filing and directed readers to, "See the full complaint attached."

Three events of note occurred on March 24, 2017. First, Eberhardt received a mailing paid for by the Citizens to Elect Mayor Dave Seaman. One side of the mailing stated: "JAKE VANDENBERG SHAME ON YOU." Below that statement is a "ransom note" held in a gloved hand that read: "MARK MOYLAN DROP OUT OF THE RACE OR ELSE." This side of the mailing ended with: "TINLEY PARK DESERVES BETTER THAN THIS." The other side of the mailing read: "Want to Know Why People Are Cynical About Politics? Read the Complaint On How Jake Vandenberg and Concerned Citizen Advisor Steve Eberhardt Tried to Bully An Opponent." The mailing quoted a portion of Moylan's request for investigation file with the ARDC and included a photograph of Eberhardt.

Second, Eberhardt sent an e-mail to Seaman and Rea and copied the village board of trustees asking them to "take immediate steps to correct and retract the falsehoods you have published. . . ." Neither Seaman, nor Rea, nor any trustee responded to the request. Third, Seaman received a complaint filed by a village resident. The complaint alleged that elected officials had violated the village's ethics code and sought an investigation into leaks to private citizens of confidential village information regarding pending litigation and other matters. Eberhardt believes that Seaman, Rea, and other village officials and employees leaked the information to further their political and personal interests and those of the Tinley First slate.

On March 27, 2017, Eberhardt wrote a six-and-one-half-page letter to the ARDC addressing Moylan's request for investigation. In the letter, Eberhardt stated that: "I never advised [Moylan] I was there 'on behalf of Jake Vandenberg' nor did I advise him that 'Jake Vandenberg has mailers

ready to go and will mail them unless I (Moylan) withdrew from the race.'" Eberhardt wrote that:

> I realize this is all political maneuvering, etc. [*sic*] and to play in politics you have to have a rather tough skin. I was using those examples of the specific spins that can be put on snippets of facts. I emphasized to Mr. Moylan that the description of him by the Illinois Department of Insurance could provide a very damaging spin that I did not want to see that happen and I did not want to see him suffer personally or professionally because of the political cesspool created by former Mayor Ed Zabrocki. I also emphasized is [*sic*] was obviously his political choice to do what he wanted. Further, I advised that in my conversations with Mr. Vandenberg, he expressed to me the same concerns. Yet, if Mr. Moylan was [*sic*] a candidate [*sic*] the information from the Illinois Department of Insurance would most likely surface as political fodder.

On March 30, 2017, Eberhardt received another mailing paid for by the Citizens to Elect Mayor Dave Seaman. This mailing accused Vandenberg of failing to pay taxes and re-printed the heading from the Moylan's request for investigation by the ARDC. The mailing stated: "One of Jake's campaign advisors threatened an opponent that if he didn't drop out of the race they would release damaging information. A request for an investigation is under review by the Supreme Court's Illinois Attorney Registration and Disciplinary Commission." The mailing identified Eberhardt as the campaign advisor who threatened Moylan.

On May 11, 2017, the ARDC wrote to Eberhardt, stating that it would not proceed any further in its investigation and that its investigations are private and confidential.

On November 7, 2017, Eberhardt filed *pro se* a 17-count complaint in this lawsuit. Counts 1, 7, and 15 name the "candidate defendants" in causes of action for invasion of privacy, defamation, and tortious interference with prospective economic advantage, respectively. Counts 2, 8, and 16 present the same three causes of action respectively against Citizens to Elect Mayor Dave Seaman and Tinley First. Counts 3, 10, and 17 repeat respectively the same three causes of action against Cupp.

Counts 4 and 12 are against Janecyk for invasion of privacy and defamation, respectively. Counts 5 and 13 repeat respectively the same two causes of action against Rapisarda. Counts 6 and 14 present the same two

causes of action against Stuckly. Counts 9 and 11 are defamation causes of action against Blaney and Brooks, respectively.

Eberhardt alleges that each defendant made false statements and published false information knowing of its falsity and with reckless disregard for the truth. Further, each defendant allegedly advanced her, his, or its personal and political interests to the detriment of Eberhardt's business and personal interests and in retaliation for the political and "'watchdog' type opposition" used by Eberhardt against Seaman's and Rea's political organization. To meet the requirement that defamation claims be pleaded with a higher degree of specificity, Eberhardt summarizes the alleged defamatory statements attributed to each of the defendants. They are summarized as follows:

> Seaman, the Citizens to elect Mayor Dave Seaman, Rea, Suggs, Ficaro, Moylan, and Tinley First – specific conduct alleged has been presented above.
>
> Blaney – inquired and made statements at the February 7, 2017 trustee meeting were "a platform for Defendant Moylan's later false and *per se* defamatory statements" that Blaney knew Moylan would make about Eberhardt.
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> Cupp – appeared at the February 7, 2017 trustee meeting to state that she had seen Eberhardt come to Moylan's office "as part of the political and personal attacks volleyed at Plaintiff. . . ." Cupp is also alleged to have referred on social media to Eberhardt's conduct as extortion and blackmail and republished defamatory statements on the Facebook pages of All Things Tinley Park and Tinley Park Community Group. Cupp specifically posted on social media the statements that: (1) Eberhardt had "threatened Mark to pull out of the race or else??" and; (2) Vandenberg "blackmailed your biggest threat."
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> Brooks – posted to social media: (1) "But we know that Steve tried to Blackmail Moylan."; (2) "But Steve DID try to Blackmail Mark Moylan."; (3) "And lawyer Steve tries to blackmail Mark Moylan. OH MY!"; and (4) "guilt by association. . . ."
>
> Janecyk – posted to social media: (1) republished on the Tinley First Facebook the entire request for investigation; (2) republished on line the March 24, 2017 mailing; (3) the March 30, 2017 Tinley First mailing; (4) "You live in a community where the blackmail of a political candidate surprises no one."; (5) "Blackmail is now the accepted norm in Tinley Park politics. . . ."; (6) "They'll probably come up with a

blackmailer button to recognize this effort!"; (7) "Being criminal allegations I think we might expect silence on the matter."; (8) "What do you think about . . . [name deleted] . . . of the Concerned Citizens of Tinley Park victimizing children to get his way politically?"; (9) "There shouldn't be the blackmailing. . . ."; (10) "We don't need the blackmailers running this town, Mike."; (11) "These people are slimy stalkers."; (12) "[T]his is sport for me. . . ."; and (13) "Had I been a Trustee and Mayoral candidate accused of being involved with extortion. . . ." Additionally, Janecyk created two Facebook pages intended to attack and defame Eberhardt. One of the pages was entitled: "Citizens Against Mike Glotz for Trustee." On that page, Janecyk allegedly posted these statements: (1) "My greatest hope is that we'll expose the lies, fraud and blackmail. . . ."; (2) "I am going to focus on the blackmail allegations against Jake. . . ."; (3) "I'm just getting started here in exposing the sleaziness of these people."; (4) "you can send me whatever you've got and I will keep you and your contribution anonymous."; and (5) "Take it to my new page . . . it's 'All Attacks All the Time' without any of the fluff."

Rapisarda – posted to social media: (1) the Tinley First Facebook posting of the ARDC "Complaint" and the entire request for investigation; and (2) after being asked to delete the allegedly defamatory postings, responded, "Don't ask me to delete comments or block people after it's out."

Stuckly – republished the Tinley First Facebook posting regarding the ARDC complaint, the entire request for investigation, and the March 30, 2017 Tinley First mailing. He also posted the following statements on electronic media: (1) "[S]he may have wanted to read for the Blackmailer because his time ran out."; (2) "But you sir will have your day in Black Mail Court."; (3) "Is this the same TJ that Glotz stalked at the White Sox game with the Black Mailer. . . ."; and (4) "I wonder if Glitz's wife New [sic] he stayed late at Bailey's one night and gave a blonde lady a ride home but they took a detour?"

The defendants filed various motions to dismiss based on Code of Civil Procedure sections 2-615 and 2-619. *See* 735 ILCS 5/2-615 & 5/2-619. For their part, Seaman, Rea, Suggs, Moylan, and Ficaro, together as Tinley First, filed a combined motion under both authorizing provisions. Stuckly, Rapisarda, and Janecyk each filed separate motions to dismiss under both authorizing provisions and for attorney's fees. Blaney and Cupp filed a motion to adopt the motions of Seaman, Rea, Suggs, Moylan and Ficaro as well as Rapisarda. Two defendants did not file motions to dismiss – Citizens to Elect Mayor Dave Seaman and Brooks. Eberhardt responded to each

motion and filed motions to strike each of the defendants' motions to dismiss. This court will address the 2-619 motions exclusively since it finds them to be dispositive of all matters.

ANALYSIS

The defendants have filed motions to dismiss under both section 2-615 and 2-619. A section 2-615 motion attacks only a complaint's legal sufficiency, *DeHart v. DeHart*, 2013 IL 114137, ¶ 18, does not raise affirmative factual defenses, and alleges only defects appearing on the complaint's face. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). All well-pleaded facts and reasonable inferences arising from the complaint must be accepted as true, *Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, *Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). The paramount consideration is whether the complaint's allegations construed in the light most favorable to the plaintiff are sufficient to establish a cause of action for which relief may be granted. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of a cause of action. *DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488.

A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co.*, 159 Ill. 2d at 485. A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). A court is not to accept as true those conclusions unsupported by facts. *See Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. One of the enumerated grounds for a section 2-619 motion to dismiss is that the claim is barred by "affirmative matter" that avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9). Affirmative matter is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86. While the statute requires that affirmative matter be supported by affidavit, some affirmative matter has been considered to be apparent on the face of the pleading. *See id.*

As noted above, Eberhardt has presented three substantive claims against various combinations of defendants – defamation, invasion of privacy, and tortious interference with prospective economic advantage. Since the analysis of each argument is the same regardless of the defendant who raised

it, this court will proceed by addressing the arguments based on the causes of action Eberhardt presented in his complaint.

Defamation

The analysis of any defamation claim must begin with reference to the constitutional principle that, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. Const., amend. I. The first amendment has long been binding on the states through the fourteenth amendment. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943). There are, of course, various constitutional limitations to free speech. One such limitation affects the standard of liability – public figures must plead and prove actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). A second limitation focuses on the content of the speech and affects potential damages – if the speech relates to a matter of public concern, punitive damages are prohibited absent a showing of actual malice. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). A third limitation affects both liability and damages – if the speech relates to a matter of public concern and is brought against a media publisher, the plaintiff must establish falsity as well as fault. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990).

Against this backdrop of federal constitutional principles are state laws determining the degree of fault necessary to establish defamation. *See Gertz v. Welch*, 418 U.S., 323, 345-46 (1974). In Illinois, ordinary negligence is sufficient. *Edwards v. Paddock Pubs., Inc.*, 327 Ill. App. 3d 553, 562 (1st Dist. 2001). Thus, to state a common-law defamation claim in Illinois, a plaintiff must allege facts that: (1) the defendant made a false statement about the plaintiff; (2) the defendant made an unprivileged publication of the statement to a third person; and (3) the publication damaged the plaintiff. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). Statements are defamatory if they tend to harm a person's reputation by: (1) lowering that person's reputation in the community; or (2) deterring others from associating with that person. *Id.* (citing *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 10 (1992)); *see also Tuite v. Corbitt*, 224 Ill. 2d 490, 501 (2006) (citing *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 579 (2006)).

Illinois recognizes defamatory statements *per se* and *per quod*. *Tuite*, 224 Ill. 2d at 501 (citing *Kolegas*, 154 Ill. 2d at 10). "A statement is defamatory *per se* if its defamatory character is obvious and apparent on its face and injury to the plaintiff's reputation may be presumed." *Tuite*, 224 Ill. 2d at 501 (citing *Owen v. Carr*, 113 Ill. 2d 273, 277 (1986)). Five types of statements are considered defamatory *per se*, those that impute a person: (1) committed a crime; (2) is infected with a communicable disease; (3) cannot

perform or lacks integrity to perform employment duties; (4) lacks professional ability; and (5) engaged in consensual sexual intercourse with an unmarried person or with someone outside of marriage. *Solaia*, 221 Ill. 2d at 579-80. Damages are presumed in a claim of *per se* defamation. *Harrison v. Addington*, 2011 IL App (3d) 100810 ¶ 39 (citing *Bryson v. News Amer. Pubs., Inc.*, 174 Ill. 2d 77, 87 (1996)). In contrast, "[i]n a defamation *per quod* action, damage to the plaintiff's reputation is not presumed; rather, the plaintiff must plead and prove special damages to recover." *Tuite*, 224 Ill. 2d at 501.

A complaint for defamation *per se* need not allege the precise defamatory words, but their substance must be pleaded with sufficient precision and particularity to permit judicial review of the defamatory content. *See Mittelman v. Witous*, 135 Ill. 2d 220, 229-30 (1989). Precision and particularity are also necessary so that the defendant may formulate an answer and identify potential affirmative defenses. *See, e.g., Krueger v. Lewis*, 342 Ill. App. 3d 467, 470 (1st Dist. 2003). It is equally true that whether any particular statement is defamatory and whether any particular statement is an opinion or a factual assertion are both questions of law. *Tuite*, 224 Ill. 2d at 511; *Brennan v. Kadner*, 351 Ill. App. 3d 963, 969 (1st Dist. 2004). In short: "If a statement is factual, and it is false, it is actionable." *Solaia*, 221 Ill. 2d at 582; *see also Seitz-Partridge v. Loyola Univ. of Chicago*, 2013 IL App (1st) 113409 ¶ 29 ("[s]tatements that are capable of being proven true or false are actionable, whereas opinions are not") (citing *Moriarty v. Greene*, 315 Ill. App. 3d 225, 233 (1st Dist. 2000)).

Statements that are otherwise defamatory *per se* are not actionable if they are reasonably capable of an innocent construction. *See Green*, 234 Ill. 2d at 499. "Under the 'innocent-construction rule,' a court must consider the statement *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning." *Id.* (emphasis in original) (citing *Kolegas*, 154 Ill. 2d at 11). If a statement may reasonably be innocently interpreted, it cannot be actionable *per se*. *Id.* (citing *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982)). Courts are not to undertake a balancing of reasonable constructions. *See Mittelman*, 135 Ill. 2d at 232.

The line between fact and opinion is not always easy to draw. "While in one sense all opinions imply facts, the question of whether a statement of opinion is actionable as defamation is one of degree; the vaguer and more generalized the opinion, the more likely the opinion is nonactionable as a matter of law." *Wynne v. Loyola Univ. of Chicago*, 318 Ill. App. 3d 443, 452 (1st Dist. 2000). This legal middle ground may also apply to rhetorical hyperbole. *See Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 397 (2008) (citing *Solaia*, 221 Ill. 2d at 581, and other cases).

Indeed, "ill-informed, mean-spirited hyperbole is not necessarily defamatory *per se*." *Maag v. Illinois Coalition for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844, 850 (5th Dist. 2006). As noted in *Maag*, political and judicial campaigns are particularly ripe for outrageous, ridiculous, and inflammatory statements that are also wholly protected and non-actionable forms of speech. As the Illinois Supreme Court noted nearly a century ago:

> When anyone becomes a candidate for a public office, conferred by the election of the people, he is considered as putting his character in issue, so far as it may respect his fitness and qualifications for office, and everyone may freely comment on his conduct and actions. His *acts* may be canvassed and his *conduct* boldly censured.

Ogren v. Rockford Star Printing Co., 288 Ill. 405, 417 (1919) (emphasis in original) (cited by *Maag*, 368 Ill. App. 3d at 850).

To divine the difference between fact and opinion, Illinois courts have consistently employed a reliable measuring stick. "The test for determining whether a statement is protected from defamation claims under the first amendment is whether it can reasonably be interpreted as stating actual fact." *Imperial Apparel*, 227 Ill. 2d at 398; *see also Seitz-Partridge*, at ¶ 29 (quoting *Wynne*, 318 Ill. App. 3d at 452). A totality-of-the-circumstances approach to identify facts considers whether the statement: (1) has a precise and readily understood meaning; (2) is verifiable; and (3) has literary or social context that indicates the statement has factual content. *See Imperial Apparel*, 227 Ill. 2d at 398 (citing *Solaia*, 221 Ill. 2d at 581). The statement is considered from an ordinary reader's point of view; however, whether the statement is a factual assertion is a legal decision for the court. *Imperial Apparel*, 227 Ill. 2d at 398 (citing cases).

Applying that measuring stick to any particular defendant is also a necessary consideration in any defamation case. The reason is that the First Amendment shields defendants from liability if the allegedly defamatory statements concern public figures, unless those statements are made with actual malice. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). The determination of whether a plaintiff is a public figure is a legal issue properly decided by the court. *See Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966). The Supreme Court has defined a public figure to be someone who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351. Whether a person voluntarily and purposefully injects herself or himself into a controversy in an attempt to

influence its resolution is based on the "nature and extent of an individual's participation in the particular controversy. . . . " *Id.* at 352.

Whether the allegedly defamed plaintiff is a public figure is significant because, as noted above, liability is established only if the plaintiff pleads and proves that the defendant acted with actual malice. *See New York Times,* 376 U.S. at 280. As the court explained, "actual malice" means that the statement must be made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* In other words, where the *New York Times* standard applies to public figures, the inconsistent burden of proving truth, good motives, and justifiable ends lies with the plaintiff, not the defendant. *See Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 290 (1969).

In this case, Eberhardt claims are of defamation *per se* since the defendants' statements allegedly accuse him of extortion and blackmail. Whether those claims are actionable *per se* or non-actionable because they are subject to an innocent construction is the focal point of this court's analysis. To that end, this court has reached an initial conclusion that Eberhardt is a public figure, a conclusion that Eberhardt's complaint implicitly acknowledges. He admits that he has been involved in village politics for many years, including running for office in 2013. He has filed this and other lawsuits against the village and its elected officials based on alleged official misconduct. He has voluntarily created an electronic media presence – Tinley Sparks – to publicize information about local politics. Eberhardt apparently believes his actions have been effective since some of the defendants retaliated against him for his "political and 'watchdog' type opposition . . . against the tactics and governing practices of Seaman's and Rea's political organizations." In addition to Eberhardt's generalized interest in local politics, the record establishes that he inserted himself specifically into the controversy that is the basis of this lawsuit; indeed, he started it. In his letter to the ARDC, Eberhardt admits that he went to Moylan's office after learning of his insurance license suspension. Eberhardt's letter also admits that he issued Moylan an ultimatum – if he stayed in the race for the 2017 election, the information about the license suspension would be made public. In short, Eberhardt's generalized and specific conduct makes him a public figure for purposes of this litigation.

With those preliminary matters addressed, this court turns to the central substantive issue – whether the defendants' statements, particularly those that Eberhardt committed extortion or blackmail, are defamatory false statements of fact or subject to an innocent construction because they constitute rhetorical hyperbole. The latter has been defined as "loose, figurative language that no reasonable person would believe presented facts," *Imperial Apparel,* 227 Ill. 2d at 397, or, as similarly described by another

court, is language, when understood in context, is "obviously understood as an exaggeration, rather than a statement of literal fact." *Kolegas*, 154 Ill. 2d at 17 (citing *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974)) ("traitor" and "scab" were used "in a loose, figurative sense" and were "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members" and meant that plaintiffs' acts were reprehensible, not treasonous). Protecting rhetorical hyperbole from defamation claims assures that public debate will not suffer for a lack of "imaginative expression" that "has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20 (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)).

The United States Supreme Court has previously considered whether the word "blackmail" constitutes rhetorical hyperbole in a case so factually and legally pertinent to this one that it is singularly dispositive. In *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970), a Maryland real estate developer negotiated with a suburban city council to obtain a zoning variance on certain land he owned and, simultaneously, to sell to the city other land he owned that the city wanted to purchase. *See id.* at 7. A local newspaper published articles stating that the developer's negotiating position had been described as "blackmail," which prompted the developer to sue the newspaper for libel. *See id.* at 7-8. The Supreme Court rejected the developer's contention that liability could be premised on the view that "blackmail" implied that the developer had actually committed a crime. *See id.* at 13. Rather, the court held that "the imposition of liability on such a basis was constitutionally impermissible – that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review." *Id.* Since the published reports were accurate, the Court reasoned that, "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." *Id.* at 13-14.

In applying *Greenbelt* to the facts of this case, no irony is lost that Eberhardt's defamation allegations are based on the defendants' comments about his own admitted conduct. Eberhardt's letter to the ARDC acknowledges that he told Moylan that he had a "political choice" to stay in his race or deal with the "very damaging spin" that would result from the story of his suspended insurance license being made public. Eberhardt states that: "At no time did I threaten, 'extort' or 'blackmail' Mr. Moylan," yet he also acknowledges that "this is all political maneuvering. . . ." Call Eberhardt's words a threat, extortion, blackmail, an ultimatum, or "if-you-don't-drop-out-of the-race-your-past-will-come-back-to-bite-you," it is the same conduct.

The legal issue is whether anyone who would hear or read of the defendants' descriptions of Eberhardt's conduct as "extortion" or "blackmail" would associate his conduct with criminal activity. In Illinois courts, extortion and blackmail are synonymous. *See Jordan v. Knafel*, 355 Ill. App. 3d 534, 540 (1st Dist. 2005), (citing *Becker v. Zellner*, 292 Ill. App. 3d 116, 129 (2d Dist. 1997), and *People v. Mahumed*, 381 Ill. 81, 84 (1942)). Blackmail is defined as "[a] threatening demand made without justification." *Id.* (quoting Black's Law Dictionary 163 (7th ed. 1999)). "The gravamen of these offenses is the exercise of coercion or an improper influence." *Id.* (citing *People v. Hubble*, 81 Ill. App. 3d 560, 564 (2d Dist. 1980)).

It is also ironic that Eberhardt admits in his letter to the ARDC that "to play in politics you have to have a rather tough skin." Politics as playful diversion is hardly the sum and substance about which this or any court should be concerned. Yet if Eberhardt wants this court to find acceptable his exertion of improper influence on Moylan, he cannot also ask this court to protect his thin skin after being called out by Moylan and his supporters. If Eberhardt cannot stand the heat, he should get out of the political kitchen where he dished out the ultimatum. In short, it is simply unbelievable that the public would construe the defendants' statements about Eberhardt's ultimatum to Moylan as anything other than run-of-the-mill political mudslinging.

Since the defendants' statements are not actionable as rhetorical hyperbole, they are also not actionable because they are either true or substantially true. The Illinois constitution enshrines truth as a sufficient defense to defamation, *see* Ill. Const. art. I, § 4, meaning that true statements cannot support a defamation claim. *Harrison*, 2011 IL App (3d) 100810 ¶ 39. Even statements that are defamatory *per se* are not actionable if they are "substantially true." *Harrison v. Chicago Sun-Times, Inc.*, 341 Ill. App. 3d 555, 563 (1st Dist. 2003). This principle derives from "the 'recognition that falsehoods which do no incremental damage to the plaintiff's reputation do not injure the only interest the law of defamation protects.'" *Republic Tobacco Co. v. North Atl. Trading Co., Inc.*, 381 F.3d 717, 727 (7th Cir. 2004) (applying Illinois law), *quoting Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993) (same). To determine whether a statement is "substantially true," a court is to consider whether the statement's gist or sting is true. A statement's gist or sting is true if it produces in the recipient's mind the same effect that the truth would have produced. *See Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2d Dist. 2004); *see also Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 71 (1st Dist. 2010). "While determining 'substantial truth' is normally a jury question, the question is one of law where no reasonable jury could find that substantial truth had not been

established." *Moore*, 402 Ill. App. 3d at 71, *quoting Wynne*, 318 Ill. App. 3d at 451-52.

The gist or sting of the defendants' statements about Eberhardt would have been the same had the truth been told, that is, using Eberhardt's version of events as presented in his ARDC letter. The general public would not be expected to know the legal definition of either extortion or blackmail, but certainly would find those words apt to describe the political shakedown that Eberhardt foisted on Moylan. In short, Eberhardt did precisely what the defendants stated he did, and that cannot be defamatory.

Since the defendants' statements about Eberhardt are permissible rhetorical hyperbole and true or substantially true, it should not matter whether they were republished. Even if that were not the case, the republishers would be immune from suit pursuant to the Communications Decency Act of 1996 (CDA), which Congress passed as part of the larger Telecommunications Act of 1996. While the CDA's anti-indecency and anti-obscenity provisions have had a checkered history of withstanding constitutional scrutiny, *see Reno v. ACLU*, 521 U.S. 844 (1997) and *Nitke v. Gonzales*, 413 F. Supp. 2d 262 (S.D.N.Y. 2005) (per curiam), *aff'd* 547 U.S. 1015 (2006), far less controversial are two of the public policies explicitly encouraged by the CDA: "(1) to promote the continued development of the Internet . . . ;" and "(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation. . . ." 47 U.S.C. § 230(b)(1) & (b)(2). To those ends, the CDA contains an absolute immunity provision for certain Internet service providers and users. As provided:

> (1) Treatment of publisher or speaker
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
> (2) Civil liability
> No provider or user of an interactive computer service shall be held liable on account of—
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
> (B) any action taken to enable or make available to information content providers or others the

> technical means to restrict access to material described in paragraph (1).

47 U.S.C. § 230(c)(1) & (c)(2).[3] The CDA makes plain its primacy over state law causes of action that would otherwise limit the scope of the statute's immunity:

> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(e)(3).

The application of the CDA to Internet speech is determined, in part, by who is considered an "information content provider." According to the statute, such a provider is "any person or entity that is responsible, in whole or in part, for the *creation* or *development* of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (emphasis added). "Courts typically have held that internet service providers, website exchange systems, online message boards, and search engines fall within this definition." *See FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (citing cases). Thus, the immunity provided by section 230(e)(3) applies "*only if* the interactive computer service provider is *not also* an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content." *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (emphasis added) (quoting 47 U.S.C. § 230(f)(3)). Federal courts have consistently held that section 230(f)(3) in combination with section 230(e)(3) prohibit the imposition of liability in state law defamation, false light, intentional economic interference, public disclosure of private facts, intrusion upon seclusion, intentional and negligent infliction of emotional distress, and negligent supervision and retention causes of action. *See, e.g., Bennett v. Google, LLC*, 882 F.3d 1163 (D.C. Cir. 2018) (company owner objecting to posting could sue blogger as content provider but not Google as publisher); *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313 (1st Cir. 2017) (§ 230 immunized website operator from liability based on content posted by third party and from providing search engine directions); *Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015) (website host that refused to remove from its servers allegedly defamatory newsletter authored by another

[3] The genesis of section 230 is summarized in *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851-852 (9th Cir. 2016).

immune under § 230); *Obado v. Magedson*, 612 Fed. Appx. 90 (3d Cir. 2015) (Internet host provider immune from defamation as re-publisher and not content provider and from claim that it manipulated search engines to maximize results relating to the alleged defamatory content); *Westlake Legal Group v. Yelp, Inc.*, 599 Fed. Appx. 481 (4th Cir. 2015) (use of automated filtering system for online reviews constituted editorial functions not content creation; therefore, defamation claim properly dismissed based on § 230); *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352 (6th Cir. 2016) (§ 230(c) immunizes the computer service from damages for providing access to third-party content concerning indecency with minor); *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016) (company immune from publishing article describing results of plaintiff's trial on rape charges); *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010) (Internet service provider and Internet bulletin board and website owners immunized by § 230(c) from posting anonymous defamatory statements about plaintiffs' business); *Caraccioli v. Facebook, Inc.*, 700 Fed. Appx. 588, 590 (9th Cir. 2017) (Facebook did not become information content provider by reviewing contents of suspect account and deciding not to remove it; thus, § 230 immunity applied); *Silver v. Quora, Inc.*, 666 Fed. Appx. 727 (10th Cir. 2016) (online messaging board on which Internet subscribers posted comments and responded to others constituted "prototypical" conduct immunized by § 230); *Dowbenko v. Google Inc.*, 582 Fed. Appx. 801 (11th Cir. 2014) (§ 230(c) immunized interactive computer service from artist's defamation claim arising out of publication of his photograph and other information on "American Loons" blogspot).

Courts have indicated, however, that section 230 immunity has its limits. For example, a networking website is not immune from state law failure-to-warn claims if there exists a statute imposing a duty to warn potential victims of third-party harm. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016) (addressing California law). Under certain circumstances, a website could be subject to liability if it in some way induced another party to post defamatory content or actively participated in its posting. *See Chicago Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (plaintiff could not "sue the messenger" because the message revealed third party's plan to engage in unlawful discrimination, but inducement might be sufficient to establish causation). A website is not a "passive transmitter of information" subject to immunity if it required subscribers to provide information as a condition of accessing its service. *See Fair Hous. Council*, 521 F.3d at 1166-67. Similarly, a website cannot claim section 230 immunity if it develops information by soliciting requests for such information and pays researchers to obtain it. *See FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199-1200 (10th Cir. 2009).

Here, the defendants' republications of various statements made by others squarely fall under the immunity provided by the CDA. Further, the re-publishers did not add substantive defamatory content that that would take them out of the CDA's protections. In short, Eberhardt's claims of defamation by republication are baseless.

False Light

Eberhardt's false light claims fail for the same fundamental reason as his defamation claims – the defendants' statements were not false. There are three elements to any false light cause of action: (1) the complaint's allegations must show that the plaintiff was placed in a false light before the public as a result of the defendant's actions; (2) the false light in which the statements placed the plaintiffs was highly offensive to a reasonable person; and (3) the defendant acted with actual malice. *See Lovgren v. Citizens First Nat'l Bk.*, 126 Ill. 2d 411, 419-23 (1989); *see also Kolegas*, 154 Ill. 2d at 17-18. The recognized purpose of a false light cause of action is to define and protect an area within which every citizen is to be left alone. *See id.*, 126 Ill. 2d at 420 (quoting *Leopold v. Levin*, 45 Ill. 2d 434, 440 (1970)).

The facts presented here make it impossible for Eberhardt to state a cause of action for false light invasion of privacy. First, Eberhardt initiated the conversation with Moylan and presented him with an ultimatum to force him out of the 2017 election. Second, Eberhardt admits in his letter to the ARDC that he gave Moylan an ultimatum. That the defendants later described Eberhardt's conduct in unflattering terms does not alter the fact that Eberhardt delivered the ultimatum. Since the defendants' descriptions of the events were not false, it would not be offensive to a reasonable person for the defendants to describe Eberhardt's conduct as they did. Ultimately, it is irrelevant whether the defendants acted with malice since Eberhardt cannot provide the other two elements of the tort. In sum, Eberhardt's causes of action for false light invasion are not actionable as a matter of law.

Tortious Interference

Eberhardt's tortious interference claims fail, once again, because the defendants' statements were not false. To state a cause of action for tortious interference with business relations and prospective economic advantage, a plaintiff must allege: (1) the existence of a valid business relationship or a reasonable expectancy of entering into one; (2) the defendant's knowledge of the expectancy; (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy; and (4) damage to the plaintiff resulting from the defendant's interference.

See Voyles v. Sandia Mortgage Co., 196 Ill. 2d 288, 300-01 (2001). Since this cause of action is an intentional tort, a plaintiff must show that the defendant acted purposefully to injure the plaintiff's expectancy. *See J. Eck & Sons, Inc. v. Reuben H. Donnelley Corp.*, 213 Ill. App. 3d 510, 513 (1st Dist. 1991).

It is plain that defamatory statements may be "the means by which the tortious interference with contractual relationships or prospective economic advantage is committed." *Mittelman v. Witous*, 135 Ill. 2d 220, 251 (1989) (citing *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 16 Ill. App. 3d 709, 714 (1st Dist. 1973)). As *Mittleman* and other cases make plain, however, a defendant's statements may serve as the basis for a tortious interference claim only if they are defamatory. If the statements are constitutionally protected, then all claims dependent on the falsity of the statement must fail as a matter of law. *See Perfect Choice Exteriors, LLC v. Better Bus'n Bureau of Cent. Ill., Inc.*, 2018 IL App (3d) 150864, ¶ 32 (addressing statements of opinion) (citing *Imperial Apparel*, 227 Ill. 2d at 402).

As indicated above, each of the defendants' statements constituted protected speech because they were rhetorical hyperbole and were true or substantially true. Since those statements were, as a matter of law, protected speech, they cannot serve as the basis for a derivative claim such as tortious interference. In short, these claims are also not actionable as a matter of law.

Motions to Strike & Motion for Sanctions

Eberhardt filed motions to strike each of the defendants' motions to dismiss, which required each defendant to file an additional set of briefs. Based on the contents of Eberhardt's motions, it is transparent that their purpose was to evade this court's 15-page limit applicable to all filings so that he could rehash arguments made in response to the defendants' motions to dismiss or to make arguments he had omitted. Eberhardt's subscription to the-more-I-write-the-more-I-antagonize-my-opponent school of litigation indicates that he does not care about wasting the scarcest of judicial resources – time. Each of Eberhardt's motions to strike is, itself, stricken as a violation of this court's standing order.

Various defendants, rightly annoyed by Eberhardt's flimsy complaint, filed motions for sanctions to recoup their costs and filing fees. Although this court understands their frustration, these requests must be denied because Eberhardt's claims are not so frivolous as to trigger the imposition of sanctions. At the same time, this court puts Eberhardt on notice. Eberhardt had a duty before filing this complaint to investigate the substantive law and

determine whether it supported his claims. More specifically, he had a duty to know the import of the *Greenbelt* decision and the Communications Decency Act's statutory immunity. Should Eberhardt continue his frequent-filer status in state and federal courts without appreciating the need for substantive legal support for his claims, he runs that very real risk that this or other courts may not deny similar motions for sanctions next time.

CONCLUSION

Based on the foregoing,

IT IS ORDERED THAT:

(1) each of the defendants' motions to dismiss pursuant to section 2-619 is granted;
(2) Eberhardt's complaint is dismissed with prejudice as to Seaman, Rea, Suggs, Moylan, Ficaro, Tinley First, Blaney, Cupp, Janecyk, Rapisarda, and Stuckly;
(3) this court finds that, pursuant to Illinois Supreme Court Rule 304(a), there exists no just reason to delay the enforcement or appeal of this order, or both, as to the dismissed claims;
(4) the case remains pending as to Citizens to Elect Mayor Dave Seaman and Brooks;
(5) each of Eberhardt's motions to strike is stricken;
(6) each of the defendants' motions for sanctions is denied and
(7) the October 10, 2018 case management conference at 11:00 a.m. will stand.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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